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Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 420.

EDWARD M. McGILLIN, PLAINTIFF IN ERROR,

vs.

MILTON H. BENNETT ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

CHAS. W. GOULD,
For Plaintiff in Error.
S. V. WHITE,
Of Counsel.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

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EDWARD M. McGILLIN, PLAINTIFF IN ERROR,

vs.

MILTON H. BENNETT ET AL., DEFENDANTS IN ERROR.

BRIEF OF S. V. WHITE FOR PLAINTIFF IN ERROR.

This was an action of trespass on the case brought by attachment by defendants in error against McGillin, a non-resident, in the superior court of Cook county, Illinois. It was duly removed by plaintiff in error to the circuit court of the United States for the northern district of Illinois, and tried before Hon. Henry W. Blodgett, a jury being waived by consent of both parties.

The action was for an alleged balance claimed to be due to the said Bennett & Dunman on a contract, which is set out in full in the Transcript, pages 6 to 9. For convenience of reference I print the same in this brief in the words and figures next following, having numbered the lines in the margin:

1 Know all men by these presents that we, Milton H.
2 Bennett and Robert L. Dunman, composing the firm

of Bennett & Dunman, for and in consideration of the sum of four hundred thousand dollars, to be paid as hereinafter provided, have this day sold, and do by these presents sell, transfer, assign, and convey, unto Edward M. McGillin, of Cleveland, State of Ohio, the following-described personal property, to wit:

All our ranch, cattle, horses, wagons, mules, hogs, and ranch outfit located in the Indian Territory at or near the junction of the Arkansas and Cimarron rivers, and more particularly described as follows, to wit, twelve thousand and five hundred head of cattle, to be counted, and averaging in age and sex about as follows:

Three thousand head of three, four, and five year old steers; three thousand head of two-year-olds, mixed; five thousand head of one-year-olds, mixed, and fifteen hundred head of cows and bulls, calves born in 1885 not to be counted, all of said cattle being branded in one or more of the following brands, to wit:

* * * * * * *

One hundred and twenty-five head of horses, branded in one or more of the above-described brands, and all the mules, wagons, harness, hogs, and ranch outfit located on their said ranch and used in connection therewith, and all their right, title, and interest in and to the above-described brands; also all their right, title, and interest in and to a certain lease for one hundred and twenty-eight thousand acres of land, known as the Cherokee lease, dated October, 1883, and running five years from date thereof, at a yearly rental of two and one-half cents per acre; also all their right, title, and interest in and to a certain lease for one hundred and twenty-seven thousand and two hundred and sixty-five acres of land, known as the Pawnee

lease, dated June 1, 1884, and running five years from date thereof, at a yearly rental of three cents per acre; and if the Cherokee Stock Association shall get their lease extended we guarantee an extension of said lease on same terms and at the same prices secured by other members of said Association; also three good ranch-houses, three good corrals, corn-cribs, stables, black-smith shop, and everything used in operating said ranch; also twenty-two and one-half miles of wire fence, Glidden wire, four strands, and nearly all black walnut posts, and one horse pasture, two miles square, near ranch headquarters, to be fenced and completed; to have and to hold the said property above described unto him, the said Edward M. McGillin, his heirs and assigns, forever.

We agree to deliver possession of all the above-described property to the said Edward M. McGillin, on the ranch, on or before the 15th day of July, 1885, we to pay all ranch expenses, taxes, and rental on lease up to date of delivery, the said Edward M. McGillin to refund to us all money paid by us on lease beyond date of delivery.

Should the number of cattle delivered by us to the said Edward M. McGillin exceed twelve thousand and five hundred head the said Edward M. McGillin is to pay us in cash the sum of twenty-five dollars per head for such excess, in addition to the other consideration herein provided for, and should said number fall short of twelve thousand five hundred head we are to credit the said Edward M. McGillin on the amount herein provided, to be paid at the rate of twenty-five dollars per head, for such deficit. The consideration of four hundred thousand dollars above specified is to be paid by the said Edward M. McGillin as follows, to wit: The sum of twenty-five thousand dollars paid cash in hand, the receipt whereof is

hereby acknowledged; the sum of seventy-five thousand dollars to be paid July 25, 1885, for which the said Edward M. McGillin is to execute his negotiable promissory notes, of even date herewith, payable to us or our order, at the Fourth National Bank of New York City, on said 25th day of July, 1885, with eight per cent. interest from date; sixty-six thousand dollars to be paid July 1, 1886; sixty-six thousand dollars to be paid November 1, 1886, for which said two last-named amounts the said Edward M. McGillin is to execute his several negotiable promissory notes bearing date on July 15, 1885, and payable to us or our order, at the Fourth National Bank of New York City, on said 1st day of July, 1886, and 1st day of November, 1886, with eight per cent. interest per annum from date of said notes; the remaining one hundred and sixty-eight thousand dollars is to be paid by the said Edward M. McGillin on the 15th day of July, 1885, as follows, to wit: On said 15th day of July, 1885, the said Edward M. McGillin is to convey to us, the said Milton H. Bennett and Robert L. Dunman, by deed of general warranty, free and clear from all incumbrances, taxes, and liens of every kind and character, eighty-four acres of land lying and situate in the county of Cook and State of Illinois, more particularly described as being in certain blocks of Crosby and others' subdivision of the south half of section five, township thirty-seven N., R. thirteen, lying west of the Chicago, Rock Island and Pacific railway—

We, the said Milton H. Bennett and Robert L. Dunman, hereby covenanting that the property herein sold and conveyed to the said Edward M. McGillin is free and clear from all incumbrance, and that we will warrant and defend the title to the said cattle, horses, and stock unto the said Edward M. McGillin, his heirs and assigns, forever—

We, the said Milton H. Bennett and Robert L. Dunman, hereby expressly reserving a vendor's lien on all the property herein sold and conveyed for the security and payment of the two amounts of sixty-six thousand dollars each herein provided to be paid, respectively, on the 1st day of July, 1886, and the 1st day of November, 1886, hereby expressly reserving the right, power, and authority to advertise and sell any or all of said property by giving thirty days' notice of the time and place of such sale in some daily newspaper published in the City of Kansas, Jackson county, Missouri, if said sums, together with all the interest due thereon, are not paid when due, according to the terms and tenor of the notes to be executed by the said Edward M. McGillin therefor.

In testimony whereof witness our hands and seals this 16th day of April, 1885.

MILTON H. BENNETT. [SEAL.]
ROBERT L. DUNMAN. [SEAL.]

I accept the above conveyance and am bound by the terms and conditions thereof.

Witness my hand and seal.

EDWARD M. MCGILLIN. [SEAL.]

An inspection of this document will show that it is an agreement for exchange of a ranch in the Indian Territory, with cattle, horses, wagons, mules, hogs, and ranch outfit (see lines 9 to 81 of contract), for 84 acres of land in the city of Chicago (see lines 88 to 101 of contract), and a balance to be paid in cash and at the maturity of certain notes provided for in the agreement. (See lines 71 to 88 of contract.)

The ranch was sold and was to be conveyed by Bennett & Dunman and the Chicago land by McGillin. The lump

price named for the ranch and ranch property was $400,000, and the price of the 84 acres of land was $2,000 per acre or $168,000.

In point of fact, the price agreed on was not a lump price of $400,000, as named in the first clause, but the $400,000 was named for convenience, upon the theory that there was about 12,500 head of cattle on the ranch, all of which cattle, whether more or less than 12,500, were sold at $25 per head, and the $400,000 was to be increased or diminished by the sum of $25 per head, as the actual count of the cattle should show an excess or a deficiency above or below the 12,500. (See lines 59 to 68 of contract.)

Applying the maxim of the civil law, "*Id certum est, quod certum reddi potest,*" the contract, succinctly stated, provides for exchanging the ranch and ranch property, aside from the cattle, for the fixed price of $87,500, and the cattle at the fixed price of $25 per head for 84 acres of Chicago land at the fixed price of $168,000, and the balance in cash and notes.

This statement is the result of a simple computation, as follows: Twelve thousand five hundred head of cattle, at $25 each, cost $312,500. Deduct this from the lump price, $400,000, and the balance, $87,500, is the valuation fixed by the parties themselves, when the contract was made, for the ranch, horses, mules, hogs, wagons, and outfit.

In pursuance of the terms of the contract, McGillin paid $25,000 cash on signing the contract, and gave a negotiable note for $75,000, which he subsequently paid at maturity.

In further pursuance of the contract, the parties met about the 15th of July following, in the Indian Territory, and counted the cattle, McGillin being prepared to give a suitable deed for the Chicago property and his notes, in accordance with the terms of the contract.

But, to the surprise and regret of all parties, and without the fault of either, the number of the cattle, instead of being about 12,500, was found to have been reduced by losses to

the number of 4,854 (see folio 81, page 35 of Record); and, counting the $100,000 cash and negotiable paper paid and delivering the deed at the price of $168,000, the ranch and outfit and cattle were more than paid for, and there would be needed a return to McGillin of $59,150 cash, besides interest, to be adjusted if the Chicago land was accepted at the agreed price.

Thereupon the present contention sprung up. Bennett and Dunman declined to accept the land, and demanded a balance of $108,850 in notes, as specified in the contract, and in default of the execution of such notes they commenced this action for said sum as a cash demand.

The trial was had, as before stated, before the judge, who filed a written opinion therein, finding judgment for the $108,850 and interest; in all, $115,580.55. (See Record, pages 29 to 35.) A motion was made in arrest of judgment and for a new trial, which was overruled, and a bill of exceptions was taken setting out all the evidence in the case (page 71 of Record). Upon the evidence the court found the facts (pages 71 to 73 of Record).

The record shows that all the proceedings of the court as the trial progressed were properly excepted to at the time by plaintiff in error. (See pages 35 to 74 of Record.)

The plaintiff assigns as errors the following grounds:

1. The court erred in admitting and considering parol proof of contemporaneous proceedings to vary or explain the written contract sued on herein.

2. The court erred in finding as a conclusion of law on the evidence and findings of fact that the plaintiff in error was liable in this action.

3. The court erred in overruling the motion for a new trial.

4. The court erred in overruling the motion in arrest of judgment.

5. The court erred in not finding for the plaintiff in error and against the defendants in error upon the pleadings, exhibits, and proofs.

I take up the first error assigned, which seems to have been the prolific parent from which all the other errors sprung, and I urge that in the contract sued upon there was no ambiguity, either latent or patent. It was an executory contract, setting out, in terms so simple and concise that any ordinary mind could perfectly understand it, the details of a trade to be consummated by the parties at a fixed time, in a fixed place, in a fixed manner.

If the defendants in error had not undertaken to deliver a number of cattle of which they had been deprived by a calamity unknown to all parties, and surely without the fault of the plaintiff in error, there would never have been any chance for a dispute.

And what earthly aid was it, in construing this contract, to admit testimony showing that defendants in error wanted $250,000 cash or they would not trade? (See folios 147 and 148, page 65 of Record, and Opinion, folio 169, page 73, Record.)

How absurd that talk is, in view of the fact that the whole outfit, including all cattle, only amounted to $208,850, especially when construed with the other condition precedent (as shown by parol evidence), that the plaintiff in error would not buy the ranch unless he could pay $168,000 in Chicago land.

The question before the court was, What did the parties in reality contract to *do*, as evidenced by their writing? not what did they say they would *not* do, in the usual backing and filling incident to an agreement for a large trade. Such evidence was never admissible at law or in equity, before any tribunal, to explain or vary a written contract, under the familiar doctrine—too familiar to need citation of authorities, but which may be found in every elementary

treatise on evidence studied in the schools. (Consult Greenleaf on Evidence, vol. 1, sections 275 to 284, and cases there cited.)

I recognize the acknowledged ability of the learned judge who tried this case, and am simply amazed that with his great learning as a jurist he has dropped into the error, in an action of law, of undertaking to act as a chancellor, proceeding to give relief to the defendants in error, who were before him at law, against a calamity for which plaintiff in error was not responsible, and against which even an equity court could not have given relief.

It is true that I am met with the record, which shows that this class of evidence was introduced in behalf of plaintiff in error, and I may be precluded from urging the technical admission of the evidence; but, on the summing up of the whole case, I am not precluded from urging this Court to properly weigh the entire evidence in the case according to the rules of law, and to find that, upon the conclusions of fact, the deductions of law were erroneous. But before passing from this branch of the case I desire to call the attention of the Court to the facts presented by the evidence, which show that if all this evidence shall be held to be properly admissible, and the Court should have been by implied consent of the parties authorized to grant all the relief possible by an equity court, the defendants in error were not entitled to relief or a judgment for any sum whatever.

There was not a word of evidence to show the cash value in the market of the Chicago real estate, on the one hand, or of the Indian Territory leases, on the other.

The Court seemed impressed with the belief, which may have been correct or may have been erroneous, that the Chicago land was not worth $2,000 per acre, cash; but the Indian Territory leases and property sold must have been as grossly out of proportion in value at $87,500.

This property consisted of a lease of 128,000 acres of pasture land, at a rent charge of $3,200 per year, having three

years and a half to run, and of another lease of 127,000 acres of land, having a little over four years to run, at an annual rent charge of $3,810; both of which were held to have been void by the Department of Justice on July 21, 1885, or, say, four days after the transfer of those leases made at Kansas City.

It is true that this decision may not have the force of a final judicial decree, but the reasoning of that opinion is so forcible and the statutes therein cited are so conclusive that I quote from the opinion to show that under the existing laws there was a complete failure of conveyance of any right to the grazing land under the transfer of those leases:

"Our Government has ever claimed the right, and from a very early period its settled policy has been, to regulate and control the alienation or other disposition by Indians, and especially by Indian nations or tribes, of their lands. This policy was originally adopted in view of their peculiar character and habits, which rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of dealing with them than that of keeping them separate, subordinate, and dependent, with a guardian care thrown around them for their protection. (3 Kent Com., 381; Beecher *vs.* Wetherby, 95 U. S., 517, where most of the cases on this subject are cited and discussed.)

"Thus in 1783 the Congress of the Confederation, by a proclamation, prohibited 'all persons from making settlements on lands inhabited or claimed by Indians without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and direction of the United States in Congress assembled,' and declared 'that every such purchase or settlement, gift or cession, not having the authority aforesaid is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession, or settlement.' By section 4 of the act of July 22, 1790, chapter 33, the Congress of the United States enacted 'that no sale of lands made by any Indians or any nation or tribe of Indians within the United States shall be valid to any person or persons, or to any State, whether having the right of

pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty held under the authority of the United States.' A similar provision was again enacted in section 8 of the act of March 1, 1793, chapter 19, which by its terms included any 'purchase or grant of lands or any title or claim thereto from any Indians or nation or tribe of Indians within the bounds of the United States." The provision was further extended by section 12 of the act of May 19, 1796, chapter 30, so as to embrace any 'purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto.' As thus extended it was re-enacted by the act of March 3, 1799, chapter 46, section 12, and also by the act of March 30, 1802, chapter 30, section 12.

"In the above legislation the provision in terms applied to purchases, grants, leases, etc., from individual Indians as well as from Indian tribes or nations; but by the twelfth section of the act of June 30, 1834, chapter 161, it was limited to such as emanate 'from any Indian nation or tribe of Indians.' And the provision of the act of 1834, just referred to, has been reproduced in section 2116, Revised Statutes, which is now in force.

"The last-named section declares: 'No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians, shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution.'

"This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such a title be a fee-simple or a right of occupancy merely is not material; in either case the statute applies. It is not, therefore, deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above-mentioned reservations held by the Indian tribes or nations respectively which claim them. Whatever the right or title may be, each of these tribes or nations is precluded by the force and effect of the statute from either alienating or leasing any part of its reservation or imparting any interest or claim in and to the same without the consent of the Government of the United States. A lease of the land for grazing purposes is as clearly within the statute as a lease for

any other or for general purposes, and the duration of the term is immaterial. One who enters with cattle or other live stock upon an Indian reservation under a lease of that description, made in violation of the statute, is an intruder, and may be removed therefrom as such, notwithstanding his entry is with consent of the tribe."

In addition there were 125 head of horses and an unenumerated lot of mules, wagons, harness, hogs, and ranch outfit, including 22½ miles of wire fence, all of which fence, having been attached to the realty, was worthless, except as the same could be used in operating the ranch, and when the leases were declared void was necessarily worthless.

It is not necessary to affirm or to deny that when the calamity was found to have overtaken the sellers of the ranch they might have sought the aid of a court of equity to relieve them from carrying out a trade wherein every feature of the business was changed by the unexpected loss of about two-thirds of the cattle which they had supposed they could use in paying for Chicago lands, and which lands they would not want to purchase unless the means of payment existed in the delivery of the cattle which both parties supposed they owned when the trade was concluded.

But if we assume that they could have asked for equitable relief they could only have asked for a total rescinding of the contract and for placing the parties *in statu quo* before the contract was signed.

This condition the defendants in error flatly declined to accept, although plaintiff in error offered to cancel the trade and to lose $5,000 expended by him on the ranch. (See folios 122 and 168 of the record.) The plaintiff in error, when the defendants in error said they had spent the money received and could not repay it, further offered to divide the land and deed them enough, at $2,000 per acre, to pay for the ranch and cattle received. This was done to avoid litigation; but it was not equitable relief the defendants in error desired or demanded. They wished to divide the contract

and receive the benefits which should enure by the sale for $87,500 of the void leases and the trifling personal property sold while they repudiated the covenants for the purchase of the Chicago realty at the agreed price.

The court seems to have taken judicial notice that the price of the Chicago land was high at $2,000 per acre, but did not take notice, either judicial or otherwise, that the void leases and ranch outfit were high at $87,500. The court failed to notice that the rent charge of $7,000, which, if the leases were acted under, was to be paid by plaintiff in error, covered lands enough to pasture more than 12,500 head of cattle; whereas he was left in midsummer (when it was too late to stock up with more cattle for fall grazing) with less than 5,000 head of cattle for the immense range upon which the large liability for rent was to be assumed.

And if the court could in an action at law make a decree in chancery, the fact that Bennett & Dunman had on this very ranch suffered losses so great that they delivered only 4,854 head of cattle instead of 12,500, which they agreed to deliver, would show plainly that the ranch was extremely unsafe for cattle, and it probably could not have been sold at any price whatever for cash. Concede that McGillin's land in Chicago, though of great prospective value, was also unsalable, and it clearly appears that it was mainly for the purpose of converting this property into assets which could to some extent be converted into cash that McGillin agreed to pay an utterly unreasonable price for the Indian Territory ranch, and to accept the cattle at figures decidedly above the market.

If it be proper in such an action as this to turn it into a forum of conscience, the defendants in error appear in a very bad light on their own testimony in an attempt to pass 1,500 head of green, unacclimated cattle at the full price, which were not worth half the contract price.

On page 63 of the record Dunman testifies as follows:

"As to the other Texas cattle that he made a kick about, the facts are these: There was a bunch of cattle that I bought

for the purpose of putting on that ranch before we sold the ranch to McGillin. In receiving these cattle I received close to 1,500 head. I shipped the cattle up there and put them on the ranch; they were the same class of cattle as those then on the ranch. The controversy between me and McGillin was that I wanted to deliver them under the contract, and McGillin did not want to receive them. The only difference between those cattle and the others then on the ranch was that they had not passed the winter in the Indian Territory. Finally, rather than to have any trouble, I sold him the cattle and he gave me a 30-day note for $18,000, which was paid."

We especially call the attention of the court to the fact that Dunman intended and endeavored to make McGillin pay for those cattle at the rate of $25 a head, but that when McGillin's attention was called to the fact that the cattle had not been wintered in the Indian Territory, Dunman then settled with him at $18,000 for the 1,500 head, or, say, at $12.00 each. This transaction shows clearly the unfairness of Dunman's procedure. If McGillin had not caught him in the act, he would have sold him 1,500 head of cattle just arrived from Texas (which he was afterwards glad to sell to McGillin at $12 per head) for $25 each, on the theory that they had wintered in the Indian Territory and were acclimated.

If the ranch had been a strictly first-rate ranch, and if the mortality, year in and year out, had been small there, it is possible that cattle acclimated and ranging there might have been worth $25 a head; but in view of the fact that the range was proven by the winter of 1884–'5 to be so hazardous as to be unfit for a winter range, it may fairly be considered that the cattle there for which McGillin agreed to pay $25 a head were really worth on that range, at the time of the sale, less than three-fourths of that contract; and it is evident that the $100,000 already paid by McGillin was a full and sufficient consideration for the 4,854 cattle delivered to him, together with the ranch and appurtenances

thereto. Indeed, it is doubtful whether, on knowing the true state of affairs, McGillin would have been willing to pay $100,000 for everything that Bennet & Dunman could deliver, viz., the ranch, with appurtenances, and 4,854 head of cattle enfeebled by exposure on a most hazardous range. This argument is made to emphasize the want of equity in the decision were the cause pending on the chancery side of the court, and does not waive the objection that at law the plaintiffs below could not demand the fulfillment of a part of the contract and disregard the concurrent obligations on their own part.

The learned judge says in his opinion, pages 32 and 33 of the record:

"It seems to me that when an actual counting of the cattle showed this large deficit in the number the defendant might properly have refused to accept the property and put plaintiffs in fault on their part of the contract; but he elected to accept what plaintiffs had to deliver on the contract, and must be held to have thereby assented to such readjustment of its terms as were made necessary by the changed facts."

The judge is in error as to the facts. McGillen had already paid $25,000 and had given his note for $75,000, which was negotiable and had already passed out of the hands of Bennet & Dunman into innocent hands, and which they were unable to return to him and McGillin was compelled to pay. He wished to rescind the contract, but he could not get his money back. Nothing was left him to do but to keep the ranch and to endeavor to make an equitable adjustment for what he had received.

On page 33 of the record Judge Blodgett writes:

"I think, therefore, that the land payment is to be treated as a present or cash payment, and that the deficiency, at the

rate of $25 per head, which is to be credited to the defendant should be proportioned in liquidation of this cash payment—that is, upon the law of the proportion of payments the court should apply this credit to the cash which the defendant would have been called upon to pay in case he should have been unable to make the title at the time called for."

The law of the proportion of payments seems to be that if payment for property is to be made partly in cash and partly in notes and the vendor fails to deliver all of the property sold, then the deduction from the purchase price on account of property not delivered should be made, first, as regards cash to be paid, and later, as regards the notes to be given, the theory being that where the non-delivery of the property is the fault of the vendor the vendor should suffer and not the vendee, the vendee being privileged to withhold the more onerous payment, viz., that of cash.

The learned judge seems to have reasoned on this line; but by counting the proposed land payment as equivalent to cash he has arrived at the extraordinary result of allowing the vendors to benefit by their own inability to fulfill the contract and has compelled the vendee to forego the advantage of selling his land, and has ordered him to pay the equivalent in cash for notes which he would have given had the vendors fulfilled their contract. The effect of this decision has been to make the vendee suffer for the failure of the vendors to deliver their property, and to relieve the vendors entirely of the equitable consequence of such failure.

In the findings of fact as found by the court (Record, folios 164 to 169, inclusive), every material finding entitles the plaintiff in error to judgment in his favor.

The execution of the contract is conceded. The payment of $25,000 cash and $75,000 of notes by McGillin is admitted. The title in fee of the Chicago land in McGillin is established and his readiness to convey the same to the purchasers upon their paying him for the same as per the terms of the contract is affirmatively decided.

There was no necessity of a formal tender of the deed when McGillin stated to Bennett & Dunman that he was then ready to convey the land, and they notified him that they would not accept the land as any part of the payment for the ranch outfit.

Upon these facts the court in rendering judgment against McGillin was not enforcing the contract. It was arbitrarily disregarding a part of the mutual obligations imposed by the terms of the contract and holding McGillin to purchase the ranch for $87,500, and the cattle for $121,350, in all $208,850, but saying to him that he, in turn, should not sell his Chicago land for the agreed price of $168,000, although the court finds that McGillin would not purchase the ranch outfit at $87,500 and the cattle at $25 each, unless Bennett & Dunman would take the land at $168,000 as part payment.

The argument by *reductio ad absurdum* will show the error perhaps more conclusively than any other argument.

If there had been 12,504 cattle rounded up and counted out to McGillin he would have been called upon to pay $232,100 cash and notes under the contract. If there had been 12,496 cattle what would have been required? Should he have paid $231,900, or should he have paid $232,000 and deducted 8 square rods of land, which, at $2,000 per acre, equals $100?

Suppose that there were 1,000 head of cattle short, would McGillin have been entitled to deduct $25,000, or must he have been compelled to pay $232,000 cash and notes and keep 12½ acres of land? But if the sound principles of law would not permit such ratable deduction, at what point in the loss of cattle are the defendants in error to be permitted to sell the cattle and ranch for cash and repudiate their purchase of the Chicago lands?

Suppose the dead cattle had numbered exactly 6,720, which would have amounted to exactly $168,000, would a

And, because the court below failed and refused to so order, we urge this court to reverse the judgment and award a new trial.

CHAS. W. GOULD,
For Plaintiff in Error.

S. V. WHITE,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1908.

No. 146.

EDWARD M. McGILLAN,
Plaintiff in Error,

vs.

MILTON H. BENNETT and
ROBERT L. DUNMAN,
Defendants in Error.

AUXILIARY BRIEF

OF

CHARLES B. McCOY.

CHARLES B. McCOY,
JOHN M. THURSTON,
Of Counsel for Defendants in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1889.

No. 146.

EDWARD M. McGILLAN,
Plaintiff in Error,
vs.
MILTON H. BENNETT AND ROBERT L. DUNMAN,
Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Auxiliary Brief of Charles B. McCoy.

May it please the Court:

Notwithstanding the large amount of the judgment in favor of defendants in error in this cause (including interest to date, the judgment amounts to about $140,000), the writer hereof cannot banish from his mind an abiding conviction that the only questions which this court will consider lie within very narrow limits, and that the answer to these questions is found in certain propositions of law that are so elementary, and rest upon such a sound basis of common sense and business necessity, that they are daily recognized and applied by every business man, and business man's accountant, in the commercial world.

Our view of the case is entirely in accord with the principal brief, which has been prepared by our associate counsel, and we fully recognize the necessity of discussing all the points that may possibly be raised by our opponents, whether we believe the points to be well taken or not; but, considering the vital importance of this case to our clients, involving, as it does, practically all that is left of their fortune, we believe it to be our duty to present to the court the conclusions at which the writer hereof arrived, when, after a few minutes consultation with his clients, he brought this suit, with all the haste necessary to secure, by attachment, the money found in possession of the garnishee herein, and the soundness of which conclusions he has never yet seen cause to doubt.

Passing for the present the technical questions arising under the federal statutes and rulings of this court regulating the modes of practice necessary to be followed in order to be entitled to a review of the case in this court, and under which regulations the writ of error will perhaps have to be dismissed or the judgment affirmed, we will present our view of the case on the merits.

On pages 71–73 of the record are found what the attorneys in the Circuit court for plaintiff in error apparently supposed were special findings of the Circuit court. If, on examination, these are found to be no more than a recital or abstract of the evidence, and that the finding on which judgment was entered was a general one, it of course ends the case, *as not a single exception was saved by plaintiff in error during the entire conduct of the case* prior to the exceptions noted at the middle of page 74 of the record, and these solitary exceptions are the only ones saved by plaintiff in error in the entire record.

Assuming, however, that these recitals on pages 71–73

of the record are special findings which this court will examine to see if they support the judgment, and whether any error in law intervened in entering the judgment, let us look at the assignments of error found on pages 77, 78 of the record, and see what errors are alleged which this court can consider.

The first error assigned is as to finding of fact; the third as to mistake in the weight of the evidence, and the fifth as to mistake in mixed questions of law and fact. This court is, by statute, according to its previous rulings, precluded from considering any of these alleged errors.

The second error assigned is as to error in finding of law. There is no such finding in the record, and no exception on which to base such an assignment of error; therefore it cannot be considered.

The fourth error assigned is, that the finding of the Circuit court is manifestly against the law of the case; but the only findings of the Circuit court are the supposed special findings of fact on pages 71–73 of the record, to which no exception was saved, and the general finding in favor of defendants in error, in the judgment in their favor (Rec., 34, 35), all of which findings this court is, by statute, precluded from examining with a view to a reversal of the judgment for any error in such findings, so that this assignment of error cannot be considered.

The sixth and seventh errors are assigned to the overruling of the motions of plaintiff in error for a new trial, and in arrest of judgment; but as plaintiff in error saved no exceptions during the trial, and as no reasons presented to support the motion in arrest of judgment, there is nothing to be considered, except such questions as properly arise on the eighth and ninth assignments of error,

which are, that it was error to enter judgment in favor of defendants in error instead of plaintiff in error, and under these assignments, if at all, the court must consider this case.

No questions arise on the pleadings, and as no exceptions were saved by plaintiff in error during the trial, we do not suppose this court will pay any attention to the abstract of the evidence which is found in the record, or look into the questions of fact further than as they are specially found by the Circuit court.

The first thing specially found (Rec., 71) is that the parties plaintiff and defendant executed the written contract of April 16, 1885, a copy of which is set out in the first count of the declaration. (Rec., 6 to 9.) This makes the contract a part of the findings, and we extract from it verbatim all that we consider material to the determination of the case by this court. These parts of the contract are as follows:

"* * * Bennett and Dunman, for and in consid-
"eration of the sum of four hundred thousand dollars, to
"be paid as hereinafter provided, have this day sold *
" * * unto Edward M. McGillan, * * * all our
"ranch, cattle, horses, wagons, mules, hogs and ranch
"outfit, * * * to wit: twelve thousand five hundred
"head of cattle to be counted. * * *"

"We agree to deliver possession of all the above de-
"scribed property to the said Edward M. McGillan, on
"the ranch on or before the 15th day of July, 1885. *
" * *"

"Should the number of cattle delivered by us to the
"said Edward M. McGillan exceed twelve thousand and
"five hundred head, the said Edward M. McGillan is to pay

"us in cash the sum of twenty-five dollars per head for "such excess in addition to the other consideration herein "provided for; and should said number fall short of "twelve thousand head, we are to credit the said Edward "M. McGillan on the amount herein provided to be paid, "at the rate of twenty-five dollars per head for such "deficit."

"The consideration of four hundred thousand dollars "above specified is to be paid by the said Edward M. "McGillan, as follows, to wit: the sum of twenty-five "thousand dollars paid cash in hand (April 16, 1885), "the receipt whereof is hereby acknowledged, the sum "of seventy-five thousand dollars to be paid July 25, "1885, for which the said Edward M. McGillan is to exe- "cute his negotiable promissory notes of even date here- "with, (April 16, 1885), payable to us or our order, * "* * sixty-six thousand dollars to be paid July 1, "1886; sixty-six thousand dollars to be paid November "1, 1886, for which said two last named amounts the said "Edward M. McGillan is to execute his several negoti- "able promissory notes bearing date on July 15, 1885, "and payable to us or our order, * * * on said 1st "day of July, 1886, and 1st day of November, 1886." * * * .

"The remaining one hundred and sixty-eight thousand "dollars is to be paid by the said Edward M. McGillan "on the 15th day of July, 1885, as follows, to wit: On "said 15th day of July, 1885, the said Edward M. Mc- "Gillan is to convey to us * * * eighty-four acres "of land * * *."

"We, * * * reserving a vendor's lien on all the "property herein sold and conveyed, for the security and "payment of the two amounts of sixty-six thousand dol-

"lars each herein provided to be paid, respectively, on "the 1st day of July, 1886, and the 1st day of Novem- "ber, 1886." * * *

Thus, according to the contract, to get it in still more concise form, Bennett and Dunman were to deliver the property July 15, 1886, and McGillin was to pay for it at the dates and in the manner following, viz:

April 16, 1885, cash in hand	$ 25,000 00
April 16, 1885, by note due July 25, 1885	75,000 00
July 15, 1885, in land	168,000 00
July 1, 1886, note to be paid	66,000 00
November 1, 1886, note to be paid	66,000 00
Making the total consideration of	$400,000 00

This is the substance of the contract. The Circuit court finds (Rec., 71) that in performance of the contract McGillin on April 16, 1885, paid the $25,000 in cash, and delivered to Bennett and Dunman the note for $75,000, which they sold, and it was afterwards paid. This disposed of the first two payments to be made.

The court next finds that on and prior to July 14, 1885, Bennett and Dunman, in performance of the contract, delivered and McGillan accepted and took possession of the ranch and outfit and 4,854 head of cattle, and that this number delivered fell short of the estimated number named in the contract by 7,646 head, which at the contract valuation of $25 per head amounted to the sum of $191,150, which Bennett and Dunman were, by the contract, required to credit to McGillin on the $300,000 of the estimated contract price still remaining unpaid.

It never could have been contemplated that any part of this credit should be applied on the two payments aggregating $100,000 made April 16, 1885, because the con-

tract provided they should be paid, and McGillin made these two payments, three months before the question of a shortage in the number of cattle was to be determined, and three months before it was determined, and there is no provision in the contract for repaying any part of this $100,000, and there would have been no reason for making such a provision, so the credit could only be applied on the $300,000 still remaining unpaid.

The counting and delivery of the cattle was to be concluded, and the excess in the number, if any, ascertained and paid for by McGillin in cash, at $25 per head, or the shortage and amount of the credit determined, on July 15, 1885, and on that same day McGillin was to make the payment of $168,000.

If there was an excess of cattle the payment would be more than the $168,000, (which McGillin had the right to pay in land,) but the *excess must* be paid in cash. If there was a shortage in the number of cattle and consequently a credit to be made, the extent of the shortage, and the amount of the credit by reason thereof, was to be determined and the credit made on July 15, 1885, the same day the payment was to be made, so it is apparent the intention was that the amount of the excess was to be added to, or the amount of the credit deducted from this payment.

In other words a payment was to be made on that day which was estimated at $168,000, but the precise amount of which was to be determined by a count of the cattle, and which payment would be either greater or less than the estimate of $168,000, according as the number of cattle exceeded or fell short of the estimated 12,500 head.

On this state of fac's and under this contract, the ordinary accountant or book-keeper would state the account substantially as follows:

EDWARD M. MCGILLIN,
IN ACCOUNT WITH BENNETT AND DUNMAN.

1885.			Dr.
Apl. 16.	To cash payment due		$ 25,000
" 16.	To note to be given to-day		75,000
Apl. 16.	To total payment to be made to-day		$100,000
	Contra.	Cr.	
Apl. 16.	By cash payment received	$ 25,000	
" 16.	By note received	75,000	
Apl. 16.	By total credit received to-day		$100,000
Apl. 16.	Account balanced		000,000
1885.			Cr.
July 15.	By credit for shortage of 7,646 cattle at $25 a head		$191,150
	Contra.	Dr.	
July 15.	To payment due to-day in land or money	$168,000	$168,000
July 15.	By balance still to your credit		23,150
	Contra.		Dr.
	To payment due July 1, 1886, for which note is to be given	66,000	
	less above balance to your credit	23,150	
	leaving amount for which note is to be given		$ 42,850
	To payment due November 1, 1886, for which note is to be given		$66,000
	To total amount of deferred payments to be evidenced by notes		$108,850

McGillin should, therefore, have given his two notes, one due July 1, 1886, for $42,850, the other one due November 1, 1886, for $66,000, with interest, according to the contract. He refused to give the notes, and Bennett and Dunman sued him for the damages occasioned by

such breach of contract, and recovered judgment for the $108,850, with lawful interest from July 15, 1885, the day he should have given the notes, to the date of the judgment, July 26, 1886, amounting altogether to the sum of $115,580.55.

Now let us see whether or not the accountant or book-keeper, in thus stating the account and applying the credit according to the every-day usage of business, was proceeding according to the correct rules of the law applicable to this case.

Under the contract, the giving of the notes for the deferred payments due July 1, 1886, and November 1, 1886, was not to be payment of these deferred debts. On the contrary, a vendor's lien is expressly reserved in the contract as security for these deferred payments. In addition to this plain provision of the contract, we cite the court to the following authorities applicable to this proposition:

"That a note, without a special contract, would not, of "itself, discharge the original cause of action, is not de- "nied."

Sheehy v. *Mandeville*, 6 Cranch, 264.

"It is generally true that giving a note for a pre-exist- "ing debt does not discharge the original cause of action "unless it is agreed that the note shall be taken in pay- "ment."

United States Bank v. *Daniel*, 12 Peters, 56.

"By the general commercial law as well of England, "as of the United States, a promissory note does not dis- "charge the debt for which it is given, unless such be "the express agreement of the parties; it only operates

"to extend until its maturity, the period for the payment "of the debt."

The Kimball, 3 Wall., 45.

To the same effect, without conflict are many other cases. See:

Lyman v. *Bank of United States*, 12 Howard, 225.
Downey v. *Hicks*, 14 Howard, 240.
Heartt v. *Rhodes*, 66 Ill., 351.
Walsh v. *Lennon*, 98 Ill., 27.

Therefore, as these deferred payments were not due at the time the credit was required to be made, and as we have already seen that the credit could not be applied on the payments made April 16, 1885, three months before the credit arose, we will very briefly summarize the law concerning the application of credits to payments, in so far as it is material to the determination of this case as follows:

If an immediate credit is to be given, it must be given on a debt due at the time.

In support of this proposition we cite the following authorities:

Field v. *Holland*, 6 Cranch, 8, 28.
McDowell v. *Blackstone Canal Co.*, 5 Mason, 11.
Goss v. *Stinson*, (Story J.) 3 Sumner, 112.
Caldwell v. *Wentworth*, 14 N. H., 431, 439.
Bacon v. *Brown*, 1 Bibb (Ky.), 334, 336.
2 Greenleaf on Evidence, § 533.
2 Parsons on Contracts, * pp. 631--633.

This, in our judgment, ends the case on the merits. As the $168,000 was the only payment due at the time the credit was to be given, and in view of the able brief of our associate counsel, we do not deem it necessary to further prolong this argument.

Answer to Points in Brief for Plaintiffs in Error.

Since the foregoing was written we have examined the brief filed for plaintiffs in error, and in view of the fact that its character and contents are altogether different from what we had expected, we wish to make a few suggestions in reply to it.

The first assignment of error is, as to the admission by the court of parol evidence to vary or explain the written contract.

If the court will turn to page 37 of the record, they will find that all this parol evidence was offered by plaintiff in error, and against the objection and subject to the exception of defendants in error. This ought to dispose of this point, for it is elementary law, that a man cannot take advantage of his own wrong. If anything further is needed to determine this point against plaintiff in error it will suffice to say that he saved no exception to the introduction of this parol evidence.

No attempt is made in the brief to support the third and fourth assignments of error therein made, so that the court will not consider them.

As to the second and fifth errors assigned in the brief, we think the argument and authorities we have already presented a sufficient answer. As to the supposed *reductio ad absurdum*, referred to on page 17 of the brief, it is

sufficient to say that this court will only determine the case before it, not some other or imaginary case. No such contingency as those referred to has arisen, therefore it is not necessary to decide what would have been the proper course in the event of such a contingency.

Plain and definite provision was made in the contract for the exact contingency which did arise, and this was all that was necessary. A great many contingencies might be imagined, for which no express provision would be found, and the same is probably true of every contract ever made, but this by no means impairs the force of the contract as to contingencies which are expressly provided for.

We think this disposes of all the points made in the brief, which this court can consider on this record.

The argument and citation of a decision of the department of justice that the Indian Territory leases were contrary to law and valueless, on pages 9 to 12 of the brief, are not based on the record. Counsel admit on page 9 that there is no evidence in the record on this subject.

On the question of the leases being illegal it might be sufficient to cite the case of the Arkansas justice of the peace who sentenced the prisoner to death by hanging for horse stealing, and who, on the prisoner objecting that it was illegal and beyond his authority to pass such a sentence, replied that the prisoner would be hung just the same, and he was hung.

We might say that whether legal or illegal, the leases still hold good, and plaintiff in error and his assigns, ever since the summer of 1885, have been pasturing from 20,000 to 30,000 cattle on this ranch, and that the pasture of these cattle is worth two dollars per head per year,

and this number of cattle could have been procured at any time from owners who would willingly pay this price for hired pasture; that the income from this pasture alone has been from $40,000 to $60,000 per year for the five years since plaintiff in error took possession, and we would be stating the facts in regard to the matter, but these facts are not shown by the record.

We might further say that if counsel for plaintiff in error, or the department of justice will investigate the facts they will find that the Indians have a patent title from the government to the lands whereon this ranch is situated, and that neither the department of justice, nor Congress itself can set aside this patent, and we might cite the court to the cases of

Moore v. *Robbins*, 96 U. S., 530,
Steel v. *Smelting Co.*, 106 U. S., 447,

and numerous other decisions of this court to the effect that such a patent title to land can only be set aside by a proceeding in the Federal court in equity; and, again we would be correctly stating the facts and citing the law applicable thereto; but, again, we would also be dealing with questions which do not arise upon this record.

The attack of Mr. Dunman's fairness on pages 13 and 14 of the brief is unwarranted and unjust, and cuts no figure in the case any way, but since it has been made it is no more than fair to Mr. Dunman to say that in the preliminary negotiations which resulted in the making of this contract it was stipulated (Rec., 42) that if the contracted number of cattle were not there when counted Bennett & Dunman were to make the number good. That the evidence further shows that Mr. Dunman had bought the Texas cattle, before the sale was made to McGillin, for

the purpose of putting them on the ranch, and that he simply carried out his original intention and held these cattle separate from the other cattle on the ranch until the arrival of Mr. McGillin when the matter was amicably adjusted between them.

The opinion of Judge Blodgett which is found on pages 29 to 34 of the record fully explains the views which he took of this case, and also shows conclusively that in passing upon the case he did consider the parol evidence introduced by plaintiff, in error in arriving at his decision, and this same fact is shown by the special findings on page 73 of the record where the court finds the facts as to the preliminary negotiations preceding the execution of the contract, and which finding of fact is a part of the basis for the judgment. Under this condition of things the authorities cited in the brief of our associate counsel are clearly in point, and the decision of the Circuit court involved a mixed question of law and fact which this court cannot consider.

All of which is respectfully submitted.

CHARLES B. McCOY,
For Defendants in Error.

CHARLES E. POPE and
JOHN B. JOHNSON,
Of Counsel for Defendants in Error.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

No. 146.

EDWARD M. McGILLIN, PLAINTIFF IN ERROR,

vs.

MILTON H. BENNETT AND ROBERT L. DUNMAN,
DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

List of Authorities Cited by Counsel for Defendants in Error not Cited in Their Brief.

I.

Where a jury is waived by the stipulation of the parties and the case tried by the court, unless exceptions are taken to the receiving or rejecting of evidence by the circuit court, the evidence will not be considered by the Supreme Court, and the special findings of fact can only be considered so far

as to ascertain whether or not the findings of the court are sufficient to support the judgment in the case.

Miller *vs.* Life Ins. Co., 12 Wall., 285 (which reviews a number of cases on these points).
Ins. Co. *vs.* Mea, 21 Wall., 158.
Jennisons *vs.* Leonard, 21 Wall., 302.
Allen *vs.* St. Louis Bank, 120 U. S. R., 20.
Stanley *vs.* Supervisors of Albany, 121 U. S. R., 535.
Beckendorf *vs.* Johnson, 123 U. S. R., 617.
Andes *vs.* Slawson, 130 U. S. R., 435.

And as the latest declaration of this Court upon this subject:

Missouri P. R. R. Co. *vs.* Chicago & Alton R. R. Co. (U. S. Sup. Ct.; decided Oct. term, 1889).

II.

The matter of granting or refusing a new trial is solely within the discretion of the circuit court, and the Supreme Court will not review its action in this respect.

Wright *vs.* Hollingsworth, 1 Peters, 165.
Laber *vs.* Cooper, 7 Wall., 566.
Indianapolis, &c., R. R. Co. *vs.* Horst, 93 U. S. R., 291.
Kerr *vs.* Clampitt, 95 U. S. R., 188.
Newcomb *vs.* Wood, 97 U. S. R., 581, 583–'4.
Chateaugay Iron Co., petitioner, 128 U. S. R., 544.
R. W. Co. *vs.* Heck, 102 U. S. R., 120.
Bullitt Co. *vs.* Washer, 130 U. S. R., 142, 145.
Arkansas Valley Land and Cattle Co. *vs.* Mann, 130 U. S. R., 69; and
Missouri P. R. R. Co. *vs.* Chicago & Alton, *supra*, being the last decision given on this subject by this Court atthis term.

III.

In considering on a writ of error any action of the circuit court in overruling a motion in arrest of judgment the Supreme Court will only consider whether or not there are any defects upon the face of the record, and the evidence is no part of the record for this purpose.

Carter *vs.* Bennett, 15 How., 354, 356–'7.
Bond *vs.* Dustin, 112 U. S. R., 604, 608–'9.

IV.

A party offering evidence is understood as waiving any objections as to its competency.

Greenleaf's Lessee *vs.* Birth, 5 Peters, 132.

V.

Mixed questions of law and fact when decided by the circuit court, without the intervention of a jury, are not open for consideration by the Supreme Court. What constitutes a mixed question of law and fact?

Etting *vs.* Bank, 11 Wheat., 59.
Barreda *vs.* Silsbee *et al.*, 21 How., 146.
Wiggins *vs.* Burkham, 10 Wall., 129.
Cooley *vs.* O'Connor, 12 Wall., 391.
Republican River Bridge Co. *vs.* Kansas P. R. W. Co., 92 U. S. R., 315, 318, 319.

VI.

Cases illustrating the difference between a sale and a barter of property.

Barbe *vs.* Parker, 1 H. Blackstone R., 283.
Forsyth *et al. vs.* Jervis, 1 Starkie's R., 355.
Sheldon *vs.* Cox, 3 Barn. & Crepp., 420.
Hands *vs.* Burton, 9 East., 349.
Harrison *vs.* Luke, 14 M. & W., 139.

CHARLES E. POPE,
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A. McCOY,
JOHN L. PEAK,
J. B. JOHNSON,
CHARLES B. McCOY,
Of Counsel.

WASHINGTON, D. C., *December*, 1889.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

EDWARD M. McGILLIN,
Plaintiff in Error,

vs.

MILTON H. BENNETT AND ROBERT L. DUNMAN,
Defendants in Error.

STATEMENT & BRIEF FOR DEFENDANTS IN ERROR.

BY JOHN L. PEAK.

A. McCOY AND
J. B. JOHNSON,
Of Counsel.

KANSAS CITY, MO.:
GERARD BROS. & WOODY, PRS., 613 DELAWARE STREET.
1889.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

EDWARD M. McGILLIN,
Plaintiff in Error,

vs.

MILTON H. BENNETT AND ROBERT L. DUNMAN,
Defendants in Error.

STATEMENT.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

The suit was originally brought in the Superior Court of Cook County, Illinois, but was, upon the petition of plaintiff in error, removed to the Circuit Court of the United States for the Northern District of Illinois.

The suit was brought by defendants in error to recover a balance claimed by them to be due from

plaintiff in error upon the sale of a cattle ranch, with the outfit, fixtures and cattle pertaining thereto, in the Indian Territory.

The contract sued on is set out in the declaration, and is, in words and figures, as follows [Record, p. 6]:

"Know all men by these presents, that we, Milton H. Bennett and Robert L. Dunman, composing the firm of Bennett & Dunman, for and in consideration of the sum of four hundred thousand dollars, to be paid as hereinafter provided, have this day sold, and do by these presents sell, transfer, assign and convey, unto Edward M. McGillin, of Cleveland, State of Ohio, the following described personal property, to-wit:

"All our ranch, cattle, horses, wagons, mules, hogs, and ranch outfit, located in the Indian Territory, at or near the junction of the Arkansas and Cimaron rivers, and more particularly described as follows, to-wit: Twelve thousand five hundred head of cattle, to be counted, and averaging in age and sex about as follows: Three thousand head of three, four and five year old steers; three thousand head of two year-olds, mixed; five thousand head of one year-olds, mixed, and fifteen hundred head of cows and bulls; calves born in 1885 not to be counted; all of said cattle being branded in one or more of the following brands, to-wit:

"One hundred and twenty-five head of horses, branded in one or more of the above described brands, and all the mules, wagons, harness, hogs, and ranch outfit, located on their said ranch and used in connection therewith, and all their right, title, and interest in and to the above described brands; also all their right, title and interest in and

to a certain lease for one hundred and twenty-eight thousand acres of land, known as the "Cherokee Lease," dated October, 1883, and running five years from date thereof, at a yearly rental of two and one-half cents per acre; also all their right, title and interest in and to a certain lease for one hundred and twenty-seven thousand and two hundred and sixty-five acres of land, known as the "Pawnee Lease," dated June 1st, 1884, and running five years from date thereof, at a yearly rental of three cents per acre, and if the Cherokee Stock Association shall get their lease extended we guarantee an extension of said lease on same terms and at the same prices secured by other members of the said association; also three good ranch houses, three good corrals, corn cribs, stables, blacksmith shop, and everything used in operating said ranch; also twenty-two and one-half miles of wire fence, Glidden wire, four strands, and nearly all black walnut posts, and one horse pasture, two miles square, near ranch headquarters, to be fenced and completed; to have and to hold the said property above described, unto him, said Edward M. McGillin, his heirs and assigns, forever.

"We agree to deliver possession of all of the above described property to the said Edward M. McGillen, on the ranch on or before the fifteenth day of July, 1885, we to pay all ranch expenses, taxes and rental on lease up to date of delivery, the said Edward M. McGillen to refund to us all money paid by us on leases beyond date of delivery. Should the number of cattle delivered by us to the said Edward M. McGillin, exceed twelve thousand and five hundred head, the said Edward M. McGillin is to pay us in cash the sum of twenty-five dollars per head for such excess, in addition to the other consideration herein provided for; and should said number fall short of twelve thousand five hun-

dred head, we are to credit the said Edward M. McGillin on the amount herein provided, to be paid at the rate of twenty-five dollars per head for such deficit. The consideration of four hundred thousand dollars above specified, is to be paid by the said Edward M. McGillin, as follows, to-wit: The sum of twenty-five thousand dollars paid cash in hand, the receipt whereof is hereby acknowledged; the sum of seventy-five thousand dollars to be paid July 25, 1885, for which the said Edward M. McGillin is to execute his negotiable promissory notes of even date herewith, payable to us, or our order at the Fourth National Bank, of New York City, on said 25th day of July, 1885, with eight per cent interest from date; sixty-six thousand dollars to be paid July first, 1886; sixty-six thousand dollars to be paid November first, 1886, for which said two last named amounts the said Edward M. McGillin is to execute his several negotiable promissory notes bearing date of July fifteenth, 1885, and payable to us or our order, at the Fourth National Bank of New York City, on said first day of July, 1886, and first day of November, 1886, with eight per cent interest per annum from date of said notes; the remaining one hundred and sixty-eight thousand dollars is to be paid by the said Edward M. McGillin, on the 15th day of July, 1885, as follows, to-wit: On said 15th day of July, 1885, the said Edward M. McGillin is to convey to us, the said Milton H. Bennett and Robert L. Dunman, by deed of general warranty, free and clear from all encumbrances, taxes and liens of every kind and character, eighty-four acres of land lying and situated in the County of Cook, and State of Illinois, more particularly described as being in certain blocks of Crosby's and others, sub-division of the south half of section five (5) township thirty-seven (37) N., R. thirty, lying west of the Chicago, Rock Island & Pacific railway.

"We, the said Milton H. Bennett and Robert L. Dunman, hereby covenanting that the property herein sold and conveyed to the said Edward M. McGillin is free and clear from all encumbrance, and that we will warrant and defend the title to said cattle, horses and stock, unto the said Edward M. McGillin, his heirs and assigns, forever.

"We, the said Milton H. Bennett and Robert L. Dunman, hereby expressly reserving a vendors' lien on all the property herein sold and conveyed for the security and payment of the two amounts of sixty-six thousand dollars each herein provided to be paid, respectively, on the first day of July, 1886, and on the first day of November, 1886, hereby expressly reserving the right, power and authority to advertise and to sell any or all of said property by giving thirty days' notice of the time and place of such sale in some daily newspaper published in the City of Kansas, Jackson County, Missouri, if said sums, together with all the interest due thereon, are not paid when due, according to the terms and tenor of the notes to be executed by the said Edward M. McGillin therefor.

"In testimony whereof, witness our hands and seals this the 16th day of April, 1885.

"[SEAL.] MILTON H. BENNETT.
"[SEAL.] ROBERT L. DUNMAN.

"I accept the above conveyance and am bound by the terms and conditions thereof.

"Witness my hand and seal,

"[SEAL.] EDWARD M. MCGILLIN."

After a jury had been impanelled for the trial of said cause, the following stipulation was filed by the parties:

STIPULATION. [Record p. 28.]

In the Circuit Court of the United States, Northern District of Illinois.

BENNETT *et al.* vs. McGILLIN. } Assumpsit.

It is hereby agreed and stipulated by and between counsel in said cause that a jury shall be waived and the cause submitted for adjudication and decision, without the intervention of a jury, to the judge of said court.

Chicago, May 4, 1886.

McCOY, POPE & McCOY,
Attorneys for plaintiffs.
HOUSE & FRY,
Attorneys for defendant.

(Endorsed): Filed May 5th, 1886.
WM. H. BRADLEY, Clerk.

The cause was then tried by the court without the intervention of a jury. [Record p. 37.] Upon the application of plaintiff in error and over the objection of defendants in error, the court admitted a mass of oral testimony for the purpose of explaining and elucidating the terms of the contract. [Record p. 37.] After hearing all the evidence in the case, the court made a special finding of facts, as follows: [Record p. 71.]

First. That the several parties, plaintiffs and defendant, entered into and executed the contract sued on of date the 16th day of April, A. D. 1885,

a copy of which is set out in the first count of plaintiffs' declaration.

That at the date of the execution of said contract the defendant, in execution thereof, paid to the plaintiffs the sum of twenty-five thousand dollars, and also executed and delivered to the plaintiffs his promissory note of that date for the sum of twenty-five thousand dollars, due and payable July 25, 1885, with interest at eight per cent per annum, and that said notes were thereafter and before maturity, for value, transferred, and were, after the commencement of this suit, paid in full by said defendant to the legal holders thereof.

Second. That on and prior to the 14th day of July, 1885, the plaintiff– delivered to the defendant and defendant accepted the ranch and ranch outfit, as called for and described in said contract, and defendant took possession of the same, and plaintiffs also delivered to defendant, at the same time, four thousand eight hundred and fifty-four head of the cattle called for by the contract, which cattle were then and there accepted by the defendant, and said four thousand eight hundred and fifty-four head of cattle were the only cattle delivered by plaintiffs to the defendant on said contract; that there was a deficiency of seven thousand six hundred and forty-six cattle from the number called for by said contract, which deficiency, at the rate of twenty-five dollars per head, amounted to the sum of one hundred and ninety-one thousand one hundred and fifty dollars, which the defendant was

entitled (to) have credited upon the sum of four hundred thousand dollars he was, by said contract, to pay plaintiffs for said ranch, ranch outfit, and cattle; that the failure of plaintiffs to deliver the full number of cattle called for by the contract was by reason of heavy losses of cattle sustained by plaintiffs from cold and starvation during the winter of 1884 and spring of 1885, whereby plaintiffs' herd was reduced from about the number called for by the contract to the number actually delivered; that plaintiffs when they made said contract in good faith believed that they had and should be able to deliver to defendant the full number of twelve thousand five hundred head, as stated in the contract, and were not aware of said losses until they attempted to round up or collect their cattle at about the time said delivery was to be made; that neither the defendant nor his agents or employes had any information, but that the plaintiffs would be able to deliver the full number of twelve thousand five hundred head of cattle, as in said contract stipulated, until notified by plaintiffs on the 14th day of July, 1885, that they had delivered all the cattle belonging to the ranch and could not deliver any more under their contract.

Third. That before the first day of July, 1885, defendant had caused a deed to be made out and signed and acknowledged by himself and wife conveying to plaintiffs the 84 acres of land in Cook County, Illinois, mentioned in the contract, but defendant did not have said deed with him and was

not prepared nor able to make delivery thereof to plaintiffs on the 15th day of July, 1885. And on said fifteenth day of July, 1885, defendant was the owner in fee of the said Cook County land, but there was an apparent encumbrance upon said land, as shown by the records of land title in said Cook County, by a deed of trust dated June 28, 1878, to one Michael W. Manning, as trustee, to secure the payment of forty thousand dollars from defendant to one Samuel A. Sawyer, and said trust deed was not released and discharged until the fifth day of December, 1885; but, in fact, the indebtedness secured by said trust deed had been fully paid on or before the first day of July, 1885, plaintiffs did not transfer or offer to transfer to defendant the two leases mentioned in the contract, and the said parties agreed to meet at Kansas City, Missouri, within a few days after the said fifteenth day of July, and then endeavor to adjust and settle all differences between them in regard to said contract; that they did so meet in Kansas City on the seventeenth day of July, and defendant then offered to convey to plaintiffs the 84 acres of land in Cook County on plaintiffs paying him the sum of $59,150 which conveyance plaintiffs refused to accept on said terms. Whereupon defendant, as he said, to avoid litigation and as a compromise, offered to convey to plaintiffs 54 acres of said Cook County lands in full payment of the balance due from him to plaintiffs for said ranch and cattle, and plaintiffs refused to accept said last mentioned offer, but defendant did

not tender any deed either of all or part of the land; that after the delivery of the ranch, ranch property, and the cattle to the defendant, as before stated, plaintiffs insisted that there was due them from defendant the sum of $108,850.00, which should be divided into two equal amounts and secured by the notes of defendant—one payable on the 1st day of July, 1886, and the other due on the first day of November, 1886, with interest on each note, $54,425.00, at the rate of eight per cent per annum. And plaintiffs also insisted that the sum of $191,150.00 to be credited to defendant on the $400,000.00 purchase price to be paid for the said ranch and cattle should be applied as a credit to extinguish the payment to be made in said Cook County land; but defendant refused to give said notes for said $108,850.00 as demanded by plaintiffs, and insisted that there was no cash payment or money whatever due from him to the plaintiffs. The defendant declined to settle, except the plaintiffs take the Cook County real estate in such settlement, and that thereupon the defendant, by way of compromise, offered the plaintiffs that if they would repay him the twenty-five thousand cash by him paid, and return to him his notes for seventy-five thousand dollars heretofore by him given under the contract, that he would then surrender to them the possession of all property delivered, throwing up the contract, and stand the loss of all monies by him expended on the ranch, amounting to about five thousand dollars. This the plaintiffs declined, stating that they had

used the money and parted with the notes, and the acceptance of the offer was entirely beyond their control.

Fourth. That at the meeting in Kansas City the plaintiffs advised the defendant of the amount of rental they had advanced on the leases named in the contract for rent subsequent to July 15, 1885, and by defendant to be refunded, and thereafter the defendant paid said rental and the plaintiffs duly transferred said leases to him. That in the preliminary negotiations between said parties which resulted in said contract, Frank R. Baker acted as agent for plaintiffs and Thomas D. Snyder acted as agent for dendant. That defendant insisted he would not purchase said ranch and cattle at the price of four hundred thousand dollars, unless plaintiffs would take his Cook County land at the sum of one hundred and sixty-eight thousand dollars, and plaintiffs insisted that they would not sell for four hundred thousand dollars, unless they could receive about two hundred and fifty thousand dollars in money, being willing to take the balance of the said purchase price in the said 84 acres of Cook County land. That before the contract was entered into and while negotiations for the same were going on the plaintiff, Bennett, visited Chicago, Illinois, and examined the Cook County lands which, by the contract, were to be taken in part payment of said ranch and cattle.

And thereupon the court rendered judgment for defendants in error for the sum of $108,850.00

with 6 per cent interest from the 15th day of July, 1885.

Thereupon the plaintiff in error filed his motion for a new trial as follows [Record p. 74]:

In the Circuit Court of the United States, Northern District of Illinois, July Term, A. D. 1886.

MILTON H. BENNETT and ROBERT L. DUNMAN
vs.
EDWARD McGILLIN.
} Assumpsit.

And now comes the defendant, by his attorneys as aforesaid, and moves the court to set aside the finding of the court and grant a new trial in said cause and for grounds of his motion shows to the court the following, to-wit:

First. The finding of the court is contrary to the evidence.

Second. The finding of the court is contrary to the law.

Third. The finding of the court is contrary to the law and the evidence.

Fourth. The court improperly refused to find in favor of defendant.

HOUSE & FRY,
Attorneys for Defendant.

But the court denied the motion, to which decision of the court in denying such motion, the defendant then and there duly excepted by his counsel. And, thereupon, the defendant moved the court in arrest of judgment and in support thereof

assigned the following: That under the pleadings upon the evidence and the findings of the court the plaintiffs are not entitled to recover. But the court denied the motion, to which action of the court in denying such motion the defendant then and there duly excepted. Whereupon the court rendered judgment upon the findings in favor of the plaintiffs and against the defendant, to which action of the court the defendant then and there duly excepted.

OPINION OF THE COURT (Record, p. 29).

MILTON H. BENNETT *et al.*,

vs.

EDWARD M. MCGILLIN.

BLODGETT, J.: This is a suit to recover a balance claimed by plaintiffs to be due them from defendant upon the sale of a cattle ranch, with the outfit, fixtures, and cattle pertaining thereto, in the Indian Territory. This case was tried by the court without a jury and depends mainly upon the legal construction to be given to the contract rather than on any disputed facts.

The material facts, as they appear in the proof, are, that on or about the 16th of April, 1885, the plaintiffs entered into a contract with the defendant whereby they agreed to sell to the defendant, for the sum of four hundred thousand dollars, their ranch, cattle, horses, wagons, mules, hogs, and ranch outfit, all located in the Indian Territory, at or near the junction of the Arkansas and Cimaron rivers, more

particularly described as follows: 12,500 head of cattle, to be counted and averaging in age and sex about as follows: 3,000 head of 3, 4 and 5 year old steers; 3,000 head of two year old, mixed; 5,000 head one-year-olds, mixed; 1,500 head of cows and bulls; calves born in 1885 not to be counted; 125 head of horses, and all the mules, wagons, harness, hogs, and ranch outfit located on said ranch and used in connection therewith, and all the rights, title and interest in and to a certain lease for 128,000 acres of land known as the Cherokee lease, dated October, 1883, and running 5 years from the date thereof, at a yearly rental of 2½ cents per acre; also all their right, title and interest in and to said lease for 127,265 acres of land known as the Pawnee lease, dated June 1, 1884, and running five years from date, at an annual rent of 3 cents per acre, and to deliver possession of all said property to defendant on or before the fifteenth day of July, 1885."

Should the number of cattle delivered exceed 12,500 head, the defendant was to pay in cash the sum of $25.00 per head for such excess, and should the said number fall short of 12,500 head, plaintiffs were to credit defendant on the amount to be paid, at the rate of $25.00 per head for such deficit. The sum of four hundred thousand dollars for said ranch and cattle, was to be paid by defendant as follows: The sum of $25,000 was to be paid in cash at the time of making said agreement; the sum of seventy-five thousand dollars was to be paid

July 25, 1885, and for which the defendant was to give his negotiable promissory notes, of even date, with said contract, payable on the 25th day of July, 1885, with eight per cent interest; $66,000.00 to be paid July 1, 1886; $66,000.00 to be paid November 1, 1886, for which two last named amounts defendant was to execute his negotiable promissory notes bearing date July 15, 1885, and payable July 1, 1886, and November 1, 1886, with eight per cent interest per annum from the date of said notes, and the remaining $168,000.00 was to be paid by said defendant on the 15th day of July, 1885, by the conveyance to the plaintiffs by deed of general warranty, free and clear of all encumbrances, taxes, and liens of every kind and character, of 84 acres of land in Crosby's sub-division of the south half of section five, township thirty-seven north, range thirteen east, situated in the County of Cook, and State of Illinois.

The defendant paid the $25,000.00 called for by the contract, to be paid at the time the contract was made, and gave his notes for $75,000.00 payable July 25, 1885, which were duly paid at maturity. It also appeared that between the 1st and 14th day of July, 1885, plaintiffs delivered to defendant the ranch and ranch outfit and property pertaining thereto, and 4,854 head of cattle, and defendant accepted the same; that plaintiffs were unable, by reason of losses in the preceding winter, to deliver the full number of cattle called for by the contract, and that there was a deficiency or shortage in the

cattle of 7,646 head, which at the rate of $25 per head, made the sum of $191,150.00 to be credited to the defendant on the purchase price of $400,000.-00, and as defendant had paid the cash payment of $25,000.00 and given his negotiable notes for the $75,000.00, due July 25, there was only a balance of $108,850.00 to be paid plaintiffs. This balance plaintiffs contended should be included in equal time notes, payable in July and November, 1886, but the defendant refused to give the notes, and contended that he was entitled to apply this credit of $191,150.00 first, in the extinguishment of the amount to be secured by the time notes, payable in 1886, and the remainder of this credit was to be applied on the payment to be made in Cook County land, and that he was entitled to convey the entire Cook County lands to plaintiffs, and plaintiffs were bound to accept same and to pay him the sum of fifty-nine thousand one hundred and fifty dollars in cash for said land. In other words, that the plaintiffs were bound to take the land at $168,000.00, and pay the defendant the balance of $59,150.00, which would remain unpaid for the land by the delivery of the ranch and cattle. So that the controversy in the case is as to whether the plaintiffs were bound to accept this land at the price fixed in the contract, and to make up in cash the deficiency in the price to be allowed for it, or whether plaintiffs could insist that the credit for the shortage on the cattle should be applied first, to extinguish the payment defendant was to make in Cook County

land, and then upon the amount to be secured by the time notes due in July and November, 1886, thus leaving this balance of $108,850.00 due plaintiffs, and this suit is brought to recover this balance of $108,850.00 on the ground that, defendant having refused to give his notes, it became at once a money demand. It is conceded upon the trial that the plaintiffs were the owners of the ranch in question, and had thereon in the fall of 1884, the whole number of cattle specified in the contract, and that they supposed, in good faith, at the time the contract was made, that they would be able to deliver to defendant the full number of 12,500 head of cattle, but that by reason of the severity of the winter of 1884-5, the plaintiffs' losses of cattle were so great that they were unable to deliver more than 4,854 head, stated. From this large deficiency in the number of cattle, which, I may say from the proof, appears to have been unexpected on the part of both parties, has arisen the difficult question of law to be determined in this case. Upon the trial I admitted a large mass of testimony in regard to the preliminary negotiations, correspondence and interviews between the contracting parties and their brokers for the purpose of obtaining, if possible, some light upon the true construction to be given to the terms of the contract, in view of the embarrassing questions which are in controversy, but I feel compelled to say that very little, if any, light as to the construction to be given to the contract was obtained from this testimony. The proof sat-

isfies me that the plaintiffs, in good faith, believed that they had the full number of cattle named in the contract, and would be able to deliver them at the time stipulated, and I have no doubt that defendant expected at that time to receive that number of cattle and to pay for them in the manner provided in the contract. That there might be a comparatively small surplus or excess of cattle over and above the number called for by the contract, or that there might be a small deficiency, is clearly indicated by the terms of the contract itself, and from the parol proof, but I have no doubt from the proof that neither party anticipated that any serious difficulty or question would arise by reason of excess or deficiency. The contract provides that any excess of cattle above 12,500 head, should be paid for in cash by the defendant at the rate of $25 per head for such excess, and should the number fall short of 12,500 head the plaintiffs were to credit the defendant on the amount provided, to be paid at the rate of $25 per head for such deficit. It appears from the proof that the defendant refused to enter into the contract, except upon condition that the Cook County land was to be taken at the specified price as part payment; and it also appears, with equal certainty, that the plaintiffs insisted that they would not sell unless they could get about $250,000.00 in cash, or what was equivalent to cash. The fair and natural conclusion in regard to the state of mind of the parties, and the view they took of the transaction at the time the

contract was made, I think is, that the plaintiffs, on the assumption that they had 12,500 head of cattle to deliver, and would get about $250,000.00 in money, or what was the equivalent of money, in cash and negotiable paper, were willing to make a sale to defendant for $400,000.00, and the defendant supposing or assuming that he was to pay the full sum of $400,000.00, would not agree to make the purchase except upon the condition that the land was to be taken at $168,000.00 as part of said sum of $400,000.00, and I think from the parol proof that plaintiffs did not consider the Cook County land as the equivalent for cash at the full amount of $168,000.00, at which they were to receive it in payment.

After the difficulty arose between the parties, growing out of this large deficiency in the number of cattle, as I have already said, defendant insisted that the contract amounted to a sale of this land to the plaintiffs for $168,000, and that inasmuch as plaintiffs had not cattle enough to fully pay for the land, they were, therefore, under obligation to make up the deficiency in cash. Afterwards, however, and in the subsequent interview between the parties, the defendant offered to convey to the plaintiffs fifty-four acres of this land in fulfillment of the contract on his part, but without designating from what part of the eighty-four acres this fifty-four acres was to be taken. Plaintiffs refused to accept this latter offer, claiming that they were entitled to time notes, due in July and November, 1886. De-

fendant refused to give such notes; then they were entitled to the money at once. The defendant tendered the plaintiffs no deed, either for the entire tract of eighty-four acres, or for the fifty-four acres which he subsequently offered to convey; but I think the proof satisfactorily shows that the defendant was in condition to have made the plaintiffs a good title, either to the eighty-four acres, or to any part of the tract. It seems to me that when an actual count of the cattle showed this large deficit in the number, defendant might properly have refused the property, and put plaintiffs in default upon their part of the contract; but he elected to accept what plaintiffs had to deliver on the contract, and must be held to have thereby assented to such readjustment of its terms as were made necessary by the changed facts. I do not think that either party to this contract intended, or understood at the time it was made, that plaintiffs were to buy this Cook County land from defendant, unless they paid him for it in the ranch and cattle property. My construction of the contract is, that it gave the defendant the option of paying $168,000 of this purchase money by the conveyance of this Cook County land; that if the defendant had declined to make conveyance, or been unable to give a good title, the amount to be liquidated by the conveyance of the land would have at once become a money payment, and would have been payable in cash on the 15th day of July, 1885. If the plaintiffs had delivered the whole number of cattle contemplated by the

contract, they would have been entitled to the note for $66,000, due July 1, 1886, and another note for the same amount, due November 1, 1886, and also to a deed of the Cook County land, or the amount of cash at which the land was to be applied on the contract in case the defendant should refuse or be unable to make a deed. I think, therefore, that the land payment is to be treated as a present or cash payment, and that the deficiency at the rate of $25 per head, which is to be credited to the defendant, should be appropriated in liquidation of this cash payment—that is, upon the law of the appropriation of payments the court should apply this credit to the cash which the defendant would have been called upon to pay in case he should have been unable to make the title at the time called for. The $168,000 to be liquidated by the land is a present payment, whether it is to be made in money or land, and if the defendant, by the terms of the contract, is entitled to a credit equal or exceeding the purchase price of the land, it should be applied upon this payment to be made in land rather than upon the deferred payments, to be evidenced by notes—that is, the land was a down payment to be made at the time of the completion of the contract.

While it undoubtedly can be said from the proof that neither party anticipated the questions, which have arisen by reason of this large deficiency in the number of cattle, yet, at the same time the contract does, in terms, provide for just this contingency, without, however, providing upon which

of the payments the deficiency should be applied if it should be large enough to exhaust either, and it becomes the duty of the court, therefore, by construing the terms of the contract, to make the application. After considerable reflection, and not without much doubt as to the soundness of my conclusions, I have finally decided that the better reason supports such construction of the contract as required that this credit should be appropriated to the extinguishment of this $168,000, which defendant was to pay at the time the property was delivered, and which he might have paid either in cash or by the conveyance of this land. Making the application of this credit first, to extinguish the land payment, leaves the sum of $108,850 due plaintiffs, for which defendant should have given his notes payable in July and November, in 1886, with interest at 8 per cent. He declined to give such notes or any notes, and hence this balance became a present demand and could be sued for.

I, therefore, find the issues for the plaintiffs, and assess the damages at $108,850, with interest at 6 per cent from the 15th day of July, 1885.

BRIEF AND ARGUMENT.

I.

This case was tried by the court without the intervention of a jury in pursuance of stipulations filed by the parties. The court, after hearing the evidence, made a special finding of facts and rendered judgment for defendants in error. No declarations of law were asked or given, and no exceptions were taken by the plaintiff in error to any order or ruling of the court during the progress of the trial. The only question presented by the record for the consideration of this court is as to the sufficiency of the facts found by the trial court to support the judgment. Neither the evidence upon which the findings are based, nor the findings themselves, as we understand the rule, will be examined by this court, except to determine whether the facts found by the court are sufficient to support the judgment.

United States Revised Statutes, Section 700.
United States Revised Statutes, Section 1011.
Insurance Company vs. Folsom, 18 Wall. 237.
Booth vs. Tiernan, 109 United States, 205.
Meath vs. Mississippi Commissioners, 109 United States, 269.
Tyng vs. Grinnell, 92 United States, 467.

II.

The chief, and almost only matter, in controversy between the parties at the trial, was the construction to be placed upon the contract of April 15, 1885, executed between the parties for the sale and purchase of the ranch and cattle therein described. There was no controversy as to the number of cattle delivered under the contract, nor as to the amount which remained unpaid thereon. It was conceded that the sum of $108,850.00 was due defendants in error for the cattle delivered by them under the contract. It was contended by defendants in error that this sum was payable in money, and that the plaintiff in error should execute to them his two notes for the sum of $54,425.00 each, the one to become due and payable in July, 1886, and the other in November, 1886, and that upon failure of plaintiff in error to execute said notes, the whole sum became due and payable as a money demand, for which defendants in error were entitled to sue.

It was contended by plaintiff in error that the sum of $108,850.00, which was due by him to defendants in error, should be credited upon the debt of $168,000.00, which he claimed that the defendants in error owed him on the purchase of the Chicago real estate, and that the defendants in error should pay him the difference between these two sums, to-wit, $59,150.00, upon the execution by him of a conveyance to the Chicago real estate.

It was contended by the plaintiff in error that the facts and circumstances preceding and attending the execution of the contract would support his construction of the instrument; and upon his application and over the objection of the defendants in error, the court admitted parol evidence for the purpose of elucidating and explaining the said contract.

While the construction of a contract is usually a question of law, which may be reviewed by the appellate court, yet when parol evidence is admitted for the purpose of elucidating, explaining or varying the terms of the written instrument, then the construction becomes a mixed question of law and fact.

In this case no declarations of law were asked or given, and this court cannot possibly determine what weight the parol evidence introduced by plaintiff in error may have had in determining the construction which the court placed upon the contract.

In the special findings made by the court, on page 73 of the transcript, the court finds:

"That defendant insisted that he would not purchase said ranch and cattle at the price of $400,000.00, unless plaintiffs would take his Cook County land at the sum of $168,000.00. And plaintiffs insisted that they would not sell for $400,000.00 unless they could receve about $250,000.00 in money, being willing to take the balance of said purchase price in the 84 acres of Cook County land."

Now, inasmuch as the purchase price of the ranch, on account of an unexpected contingency, proved to be only $208,850.00 instead of $400,000.00, it is manifest from the above finding that neither party at the time the contract was executed anticipated, expected, or intended upon such a contingency that any portion of the purchase price should be paid in Cook County land.

The court further finds that after the plaintiff in error had discovered that there would be a deficiency of 7,646 head of cattle from the number called for by the contract, and that the purchase price of ranch and cattle would amount to only $208,850.00, instead of $400,000.00, and after he had discovered that the defendants in error were not willing to accept the Cook County land in payment of any portion of this purchase price, accepted the delivery of the ranch and the 4,854 head of cattle and took possession of the same.

This court cannot possibly determine how much or how little weight the above findings may have had in determining the construction which the court placed upon the contract; but the findings themselves, coupled with the fact that parol evidence was introduced for the purpose of explaining the contract, clearly demonstrates that the construction of the instrument was a mixed question of law and fact; and as such, under the stipulation, was submitted to the decision of the court; and its findings

thereon is as final and conclusive as its finding upon any other fact or issue in the case.

Cooley vs. O'Connor, 12 Wall. 391.
Wiggins vs. Burkman, 10 Wall. 129.
Coquillard vs. Hovey, 37 N. W. R. 479.
Etting vs. Bank, 11 Wheat. 74.
Bank vs. Dana, 79 N. Y. 108.
Edelman vs. Yeakel, 27 Pa. State, 26.

The finding of the court, like the verdict of a jury, concludes mixed questions of law and fact, except so far as they may be saved by some exceptions which the party has taken to the ruling of the court upon a question of law.

Martinton vs. Fairbanks, 112 United States, 674.
Norris vs. Jackson, 9 Wall. 125.

But the plaintiff in error has taken no such exceptions in this case.

III.

The only question, then, as we conceive, presented for the consideration of this court, is as to the sufficiency of the facts found by the trial court to support the judgment. This question can only be answered in one way. The judgment is the logical and inevitable conclusion from the facts found, and any other judgment would have been inconsistent and incompatible therewith. In brief, the court found that the plaintiff in error and de-

fendants in error entered into and executed the contract sued on of date April 15, 1885, and that at the date of the execution of said contract the plaintiff in error in execution thereof paid to the defendants in error the sum of $25,000, and also executed and delivered to the defendants in error his negotiable promissory note for the sum of $75,000, due and payable July 25, 1885; and that said note was thereafter, and before maturity, for value, transferred, and was, after the commencement of this suit, paid in full by the plaintiff in error to the legal holder thereof. That on and prior to the 14th day of July, 1885, the defendants in error delivered to the plaintiff in error, and plaintiff in error accepted the ranch and ranch outfit described in the contract, and plaintiff in error took possession of the same, and defendants in error also delivered to the plaintiff in error at the same time 4,824 head of cattle called for by the contract, which cattle were then and there accepted by the plaintiff in error; and that said 4,854 head of cattle were the only cattle delivered by the defendants in error to plaintiff in error on said contract; that there was a deficiency of 7,646 head of cattle from the number called for by said contract, which, at the rate of $25 per head, amounted to the sum of $191,150, which the plaintiff in error was entitled to have credited upon the sum of $400,000 he was by said contract to pay defendants in error for said ranch, ranch outfit and cattle; that plaintiff in error did not pay defendants in error the sum of

$108,850 due them upon the delivery of said cattle, but offered to convey to them eighty-four acres of Cook County land, on condition that the defendants in error pay to him the sum of $59,150; and afterwards proposed as a compromise to convey to them fifty-four of the eighty-four acres of land in payment and discharge of said sum of $108,850, but made no tender of a deed in either case; that defendants in error declined this proposition, insisting that plaintiff in error should execute and deliver to them his two promissory notes for the sum of $54,425 each, payable respectively in July and November, 1886, in discharge of said sum of $108,850; that plaintiff in error refused to execute his notes for these amounts, insisting that there was no cash payment of money whatever due from him to defendants in error, and that the plaintiffs in error declined to settle unless the defendants in error would accept the Cook County land in payment of said sum of $108,850. These, in short, were the essential findings of the court: That the plaintiff in error was indebted to the defendants in error in the sum of $108,850 for cattle and ranch and ranch outfit sold and delivered to him, and said sum the plaintiff in error declined and refused to pay.

It is difficult to conceive how, upon these findings, the court could have rendered any other judgment than the one which was rendered.

The plaintiff in error insisted that he was entitled to a judgment against the defendants in error for the sum of $59,150, the difference between the

price of the Cook County land, $168,000.00, and the amount which he owed defendants in error, to-wit: $108,850.00. But there are no facts whatever in the findings of the court upon which to base such a judgment, and such a judgment, if rendered, would not have been supported by the findings. The only other possible judgment upon the issues made and the facts found by the court, was the judgment which was rendered.

IV.

But should the court conclude that the interpretation of the contract is subject to review in this case, as a question of law, then we submit that the construction which was placed upon the contract by the trial court is abundantly supported by the authorities, and is the only reasonable and logical construction of which the contract is susceptible.

It was contended at the trial, upon the part of defendants in error, that the contract sued on was a bill of sale, or conveyance by them to the plaintiffs in error of their ranch, ranch outfit and cattle upon the stipulated price of $400,000.00; that upon the day of delivery of the ranch and cattle only $300,000.00 of this stipulated price remained unpaid, one hundred thousand dollars having been paid in money and negotiable notes on the day the contract was executed; that of this amount $132,000 would become due and payable, one-half on July 1, 1886,

and one-half on November 1, 1886, and the remaining $168,000.00 was to be paid in money or land, at the option of plaintiff in error, on the 15th day of July, 1885, and was, therefore, a cash payment due on the day of delivery; that the deficiency of $191,150.00, arising from the shortage in the number of cattle, should be applied, first, as a credit in liquidation of the cash payment of $168,000.00 and the remaining $23,150 should be applied as a credit on the time notes falling due in July and November, 1886, reducing the amount of said notes from $132,000 to $108,850.00; that the said sum of $108,850.00 by the terms of the contract should be divided into two notes of $54,425.00 each, falling due respectively July 1 and November 1, 1886, with interest at 8 per cent from date; and inasmuch as plaintiff in error refused to execute these notes and denied the indebtedness, the whole amount became due as a money demand for which defendants in error were entitled to sue.

It was contended by plaintiff in error that said contract was a cross-sale whereby the defendants in error undertook to sell to plaintiff in error their ranch, ranch outfit and cattle for the stipulated price of $400,000.00, and the plaintiff in error undertook to sell to defendants in error the Cook County land for the stipulated price of $168,000.00; and that defendants in error were bound to accept and pay for said Cook County land regardless of what might be the ascertained value of said ranch and cattle; and that the deficiency of $191,150.00,

arising from shortage in the number of cattle delivered should be applied, first, to the extinguishment of the indebtedness of $132,000.00, which, under the contract, was to fall due in July and November, 1886, and that the difference between these two amounts, to-wit: $59,150.00 constituted an indebtedness from defendants in error to plaintiff in error for which he was entitled to judgment; or, in other words, the plaintiff in error insisted that upon the delivery of the ranch and 4,854 head of cattle, he stood indebted to the defendants in error in the sum of $108,850.00, on account of ranch and cattle sold and delivered, and that the defendants in error stood indebted to him in the sum of $168,000.00 on account of the Cook County land sold to them; that deducting his indebtedness of $108,850.00 from the $168,000.00 which defendants in error owed him, left the sum of $59,150.00 as the amount which defendants in error still owed him on the purchase of the Cook County land for which he asked judgment.

These were the two theories of construction presented for the consideration of the court at the trial, and after hearing a mass of parol evidence, at the request of plaintiffs in error, to aid the court in ascertaining the intention of the parties, the court adopted the construction contended for by defendants in error, and rendered judgment accordingly.

Should that judgment be disturbed?

It might be a sufficient answer to the conten-

tion of plaintiff in error that the contract does not, upon its face, in any manner, purport to be a cross-sale of properties, or an exchange or barter of properties, and that the court, after hearing parol evidence upon the subject, failed to find that it was the intention or understanding of the parties that it should operate as such. The introduction of parol evidence by the plaintiff in error was a concession upon his part that the contract would not, upon its face, bear the construction for which he contended; and a claim that parol evidence would demonstrate that the parties intended and understood the instrument as a cross contract for the sale and exchange of properties.

The defendant in error objected to the introduction of this evidence (Record, 38) upon the ground that parol evidence is not admissable for the purpose of adding to, detracting from or varying the terms of a written instrument, and saved an exception to the introduction of the same. But the trial court admitted the evidence over the objection of defendants in error, and the finding of the trial court is absolutely conclusive against the plaintiff in error upon his only contention in the court below and leaves him no ground whatever upon which to stand in this court.

Not only does the contract, upon its face, purport to be a plain, simple and unmistakable sale and conveyance by defendants in error to plaintiff in error of their ranch, ranch outfit and cattle for the stipulated price of $400,000.00 and nothing

more, but the plaintiff in error, at the time he signed the contract, declared, in the most solemn and emphatic manner, that such was his understanding of the instrument. Had the contract provided that the plaintiff in error should sell and convey, and the defendants in error should purchase the Cook County land at the stipulated price of $168,000.00, then, most certainly, the plaintiff in error should have signed the contract, together with defendants in error, so that they would have been mutually bound by the covenants therein. But this the plaintiff in error did not do; but underneath the signatures of defendants in error he wrote as follows:

"I accept the above conveyance and am bound by the terms and conditions thereof.

"Witness my hand and seal.

"[SEAL] EDWARD M. McGILLIN."

He thereby declared, in the most solemn and emphatic manner, and under his seal, that the instrument which we are now construing was a conveyance to him, not a sale and purchase of the Chicago real estate; not a barter or exchange of properties, but a conveyance to him; and the only obligation which he undertook by attaching his signature to the contract, was that he would make the payments at the times and in the manner therein provided. Having thus placed a construction upon the instrument in this clear, emphatic and unequivocal manner at the time he executed it, he should now be estopped from placing any other or differ-

ent construction upon the same instrument. It is a well established rule that where the parties to a contract have themselves placed a construction upon it, the courts will adopt such construction if at all compatible with the terms of the instrument.

The contention of plaintiff in error is also plainly refuted by the very terms of the contract. After making a formal conveyance of the ranch, ranch outfit and cattle to the plaintiff in error for the stipulated price of $400,000, after describing the property sold and providing for a delivery and possession to the plaintiff in error, on the 15th day of July, 1885, the contract proceeds as follows [bottom page 7, transcript]:

"The consideration of $400,000 above specified is to be paid by the said Edward M. McGillin as follows, to-wit: The sum of $25,000.00 paid cash in hand, the receipt whereof is hereby acknowledged; the sum of $75,000.00 to be paid July 25th, 1885, for which the said Edward M. McGillin is to execute his negotiable promissory notes, of even date herewith, payable to us, or our order, at the Fourth National Bank of New York City on said 25th day of July, 1885, with 8 per cent interest from date; $66,000.00 to be paid July 1, 1886; $66,000.00 to be paid November 1, 1886, for which said two last named amounts, the said Edward M. McGillin is to execute his several negotiable promissory notes, bearing date of July 15, 1885, and payable to us, or our order, at the Fourth National Bank of New York City on said 1st day of July, 1886, and said 1st day of November, 1886, with 8 per cent interest from date of said notes; *the remaining $168,000.00* is to be paid by the said Edward M. McGillin *on the 15th day of July, 1885,*

as follows, to-wit: On said 15th day of July, 1885, the said Edward M. McGillin is to convey to us, the said Milton H. Bennett and Robert L. Dunman, by deed of general warranty, free and clear from all encumbrances, taxes and liens of every kind and character, eighty-four acres of land lying and situated in the County of Cook, State of Illinois, more particularly described as being in certain blocks of Crosby's *et al.* subdivision of the south half of section five, township thirty-five north, range thirteen, lying west of the Chicago, Rock Island and Pacific Railway."

It is manifest from the terms here employed by the parties for the payment of the $400,000, that the defendants in error were first to receive, as the proceeds of the sale of the ranch and cattle, the sum of $232,000 in money and notes before they were required to accept any payment whatever in Chicago real estate. It is also equally manifest that the plaintiff in error was to convey the Chicago real estate to the defendants in error in payment of an indebtedness of $168,000, which upon a certain contingency would be due from him to them, to-wit: upon the contingency that the ranch and cattle should be ascertained to be of the value of $168,000 in excess of the $232,000 to be paid in money and notes. But this contingency never happened, and, therefore, this indebtness never accrued, and there was no indebtness on which to apply the payment of the Cook County land. The foregoing considerations would appear to be absolutely conclusive against the construction contended for by plaintiff in error.

V.

The only other construction of which the contract is susceptible, is that contended for by the defendants in error and adopted by the trial court. This construction, we submit, is abundantly supported both by reason and authority. It is contended by defendants in error that the contract in question is a simple contract for the sale of the ranch, ranch outfit and cattle therein described, and not a cross-contract for the purchase of land by defendants in error. This proposition we think abundantly supported by the following authorities:

Croom vs. Lediard, 2 M. & K. 251.
Atchison vs. Smith, 14 M. & W. 595.
McDaniels vs. Whitney, 38 Iowa 60.

The contract was a mere sale and conveyance of personal property, and not an exchange or barter of properties.

Where property is taken at a fixed money price, the transfer amounts to a sale, whether the property is to be paid for in money or goods.

Picard vs. McCormick, 11 Michigan, 77.
Herrick vs. Carter, 56 Barb. 41.
Butcher vs. Carlile, 12 Gratt. 523.
Crockett vs. Moore, 3 Sneed (Tenn.) 145.

The nature and character of the instrument is not altered or changed in the slightest degree by the fact that a part of the purchase money may be paid in land. By the terms of the contract the

plaintiff in error acknowledged himself indebted to defendants in error in the sum of $168,000.00, which he agreed to pay on a day certain by conveying the real estate in Cook County. The conveyance of the land, therefore, was designed to be a payment, a payment of an existing indebtedness. Anything is a payment which the parties agree shall be accepted as such.

Hoffman vs. Walker, 26 Gratt. 314.

This being then a contract for the sale and conveyance of the ranch and cattle, and not a contract for the purchase of the Cook County land, or an exchange of properties, it must follow as a logical and inevitable conclusion that defendants in error were under no obligation to pay plaintiff in error $168,000.00 for the Cook County land, or to accept a conveyance of the same. The contingency upon which the indebtedness of $168,000 from plaintiff in error to defendants in error was expected to accrue having never arisen, the payment in land never became due. But even if the defendants in error had delivered to the plaintiff in error, the whole number of cattle named in the contract, the plaintiff in error, in order to avail himself of the privilege of paying the $168,000 in Cook County land, would have been compelled to tender a conveyance upon the 15th day of July, 1885. Until that day the plaintiff in error had the option of paying the amount either in money or land. If from any cause he had failed to tender a good and sufficient conveyance to the land upon the day named

in the contract, then the whole sum of $168,000 would have become due and payable in money, and the defendants in error would have had the right to demand and sue for the same.

Church vs. Feterow, 2 Penrose & Watts (Penn.) 301.
Sessions vs. Ainsworth, 1 Root (Conn.) 181.
Trowbridge vs. Halcomb, 4 O. State 38.
Brooks vs. Hubbard, 3 Conn. 58.
Jones vs. Gilbert, 13 Conn. 516.
Bush vs. Canfield, 2 Conn. 485.
McAlpine vs. Lee, 12 Conn. 129.
Gregory vs. McDonnell, 8 Wend. 435.
Day vs. Day, 9 Wend. 129.
West vs. Beech, 3 Cowen 82.
Clark vs. Piney, 7 Cowen 681.
Piney vs. Gleason, 5 Wend. 393.
Berry vs. Wall, 54 Ala. 446.
Weiss vs. Maunchchunck Iron Co., 58 Pa. St. 295.
Stewart vs. Donnelly, 4 Greg. 177.
Flemming vs. Potter, 7 Watts 380.
Townsend vs. Well, 3 Day 331.
White vs. Perley, 15 Me. 470.
Powe's Adminr. vs. Powes, 42 Ala. 113.

But the court finds that the plaintiff in error did not, either on the 15th day of July, 1885, on the ranch, or subsequently at Kansas City, tender a deed to defendants in error, for either a whole or a part of the Cook County land.

It must follow, therefore, that the whole amount of the indebtedness from plaintiff in error to defendants in error became due and payable in money, and that defendants in error were entitled to sue for and recover the same.

VI.

The same conclusion will be reached by a consideration of the contract from another standpoint. By the terms of the contract the defendants in error sold and conveyed to plaintiff in error their ranch, ranch outfit, horses, mules, hogs, leases, improvements and 12,500 head of cattle, for the consideration of $400,000. Anticipating that there might be a possible excess or shortage in the number of cattle mentioned in the contract, this further provision was inserted for the purpose of meeting such a contingency [page 7 of transcript]:

"We agree to deliver possession of all of the above described property to the said Edward M. McGillin, on the ranch, on or before the 15th day of July, 1885, we to pay all ranch expenses, taxes and rental on lease, up to date of delivery. The said Edward M. McGillin to refund to us all money paid by us on lease, beyond date of delivery. Should the number of cattle delivered by us to the said Edward M. McGillin exceed 12,500 head, the said Edward M. McGillin is to pay us in cash the sum of $25.00 per head for such excess, in addition to the other consideration herein provided for; and should said number fall short of 12,500 head, we are to credit the said Edward M. McGillin on the amount herein provided, to be paid at the rate of $25.00 per head for such deficit."

Under this contract the court finds [page 7 of transcript] "that on and prior to the 14th day of July, 1885, the defendants in error delivered to plaintiff in error, and plaintiff in error accepted the ranch and ranch outfit, as called for and described

in said contract, and plaintiff in error took possession of the same, and defendants in error also delivered to plaintiff in error, at the same time, 4,854 head of cattle called for by the contract, which cattle were then and there accepted by the plaintiff in error; and said 4,854 head of cattle were the only cattle delivered on said contract; that there was a deficiency of 7,646 cattle in the number called for by said contract, which deficiency, at the rate of $25.00 per head, amounted to the sum of $191,050.00, which the plaintiff in error was entitled to have credited upon the sum of $400,000.00 he was, by said contract, to pay defendant in error for said ranch, ranch outfit and cattle."

At the time of the delivery of the cattle, there remained unpaid on the purchase price mentioned in the contract, the sum of $300,000.00, $100,000.00 having been paid by plaintiff in error in money and negotiable notes on the date the contract was executed. Of this amount the sum of $132,000.00 was to become due and payable, one-half on July 1, 1886, and one-half on November 1, 1886, with 8 per cent interest from date; the remaining $168,000.00 was to be paid in money or land at the option of plaintiff in error on the 15th day of July, 1885, and was, therefore, a cash or down payment due at that date.

Upon which of these amounts should the credit of $191,150.00 be applied?

Most certainly if this credit had been a voluntary payment, and not one arising in *invitum*, it

could not have been applied to the extinguishment of the indebtedness falling due in July and November, 1886. No debtor could be compelled or required to pay a debt before it became due by the terms of the contract which created it, and no creditor could be required to accept payment until his debt became due. The credit then should be applied, first, to the extinguishment of the indebtedness then due. By the terms of the contract the $168,000.00 became due and payable in money or land, at the option of plaintiff in error, on the 15th day of July, 1886. The plaintiff in error, having failed to tender a conveyance of the land on the day named in the contract, the whole sum became due and payable in money, and was a present existing indebtedness then due. Where an immediate credit is to be given, it must be given upon a debt due at the time.

Field vs. Holland, 6 Cranch 8-28.
McDowell vs. Blackstone Canal Co., 5 Mason, 11.
Goss vs. Stimson, 3 Sum. 112.
Caldwell vs. Wentworth, 14 N. H. 431-439.
Bacon vs. Brown, 1 Bibb (Ky.) 334-336.
Seymore vs. Sexton, 10 Watts, 255-257.
Effinger vs. Henderson, 33 Mass. 449.
Law vs. Sutherland, 5 Gratt. 357.
Brown vs. Shirk, 75 Ind. 266-271.
Baker vs. Stackpole, 9 Cowen, 420.
Hunter vs. Osterhout, 11 Barb. 33.
Boles' Heirs vs. Stickney, 26 Ala. 482-495.
Richardson vs. Coddington, 49 Mich. 1.

Applying the rule recognized and established by the above authorities, this credit should be applied, first, to the extinguishment of the indebtedness of $168,000.00 then due, and the balance after extinguishing said indebtedness, should be applied upon the indebtedness falling due in July and November, 1886, reducing said indebtedness from $132,000.00 to $108,850.00. The plaintiff, failing and refusing to execute his notes for this amount falling due in July and November, 1886, as provided by the contract, the whole amount became due and payable as a present money demand on the 15th day of July, 1885, for which defendants in error were entitled to sue and recover judgment.

We submit that both upon reason and authority, the judgment of the court below was for the right party, and should be affirmed.

Respectfully submitted.

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